

# The Kansas Estate Tax Problem



By Martin Dickenson<sup>1</sup>

The Kansas Estate Tax (KET) is a problem. Current law makes planning and compliance difficult for both taxpayers and practitioners, while creating interpretation and administration problems for the Kansas Department of Revenue (KDOR). Beginning in 2007 the KET law will produce truly bizarre results. Finally, there may be serious doubt whether the post-2006 provisions accurately reflect legislative intent. The 2006 Legislature should fix the estate tax — or repeal it.

The principal problems are summarized below.

## The Lawyer as Historian

Kansas currently imposes an estate tax<sup>2</sup> in the amount of a credit for state death taxes that was formerly allowed by the Internal Revenue Code (IRC).<sup>3</sup> Federal estate tax liability was reduced in the amount of the credit. The credit was phased out and ultimately repealed as to decedents dying after 2004.<sup>4</sup>

The amount of the Kansas tax is determined by the provisions of the IRC as it existed on Dec. 31, 1997 — more than seven years ago.<sup>5</sup> It may not be difficult for a tax specialist to determine what the IRC said in 1997, but the task can be daunting for a nonspecialist. One must have access to a version of the IRC that provides the full amendment history dating back at least to 1997, and then the amendment history must be carefully studied.<sup>6</sup>

The KDOR requires that the executor complete the April 1997 version of the United States Estate Tax Return (Form 706).<sup>7</sup> The KDOR provides an e-mail address<sup>8</sup> on its Web site<sup>9</sup> from which copies of the April 1997 version of Form 706 and the accompanying instructions can be obtained. Unfortunately, use of the 1997 form can cause further confusion. The KET is *not* based on the IRC applicable to deaths that occurred during 1997, but is instead based on the IRC as it existed on Dec. 31, 1997, *as applied to the actual year of death*. For example, § 2010 of the IRC, as in effect on Dec. 31, 1997, provided an “applicable exclusion amount” of only \$600,000 in the case of deaths during 1997, but provided for larger exclusion amounts in each year thereafter, culminating in an exclusion amount of \$1 million

## FOOTNOTES

1. The author appreciates the contributions of Jillian Hekmati, Stephen Mazza, Robert Mead, Philip Ridenour, Nancy Schmidt Roush, Willard B. Thompson, William K. Waugh, and James Weisgerber, who reviewed drafts or provided other assistance, as well as Tamara Davis, who edited the article. The views expressed in the article, however, are solely those of the author and do not necessarily represent the views of the reviewers. Any errors are entirely the author's responsibility. The author does not speak for either the University of Kansas or its School of Law, and the views expressed are strictly his own.

2. K.S.A. 79-15,102.

3. I.R.C. § 2011.

4. I.R.C. §§ 2011(b)(2) and (f).

5. K.S.A. 79-15,101(a).

6. Among the more important changes made in the federal estate tax since 1997 are these: dramatic increases in the applicable exclusion amounts; phase-out and ultimate repeal of the state death tax credit; provision of a deduction for state death taxes; repeal of I.R.C. § 2057, which provided a special deduction for family-owned businesses; and total repeal of the estate tax in 2010.

7. Kansas Department of Revenue, KANSAS ESTATE TAX BOOKLET FOR DEATHS OCCURRING ON OR AFTER MAY 22, 2003, pp. 4 and 8.

8. forms@kdor.state.ks.us

9. <http://www.ksrevenue.org/formsih.htm>

for deaths in 2006 and later years. The exclusion amount is crucial in determining whether a state death credit is available, and therefore whether a Kansas tax is imposed.<sup>10</sup> A taxpayer who uses the 1997 version of Form 706 and Instructions for a death in 2006 might well mistakenly apply the \$600,000 exclusion amount applicable in 1997, producing a substantial but entirely erroneous Kansas tax liability.<sup>11</sup>

## Phantom Returns

Because the KET requires taxpayers to apply the IRC as of December 1997, taxpayers must file with Kansas a "phantom" federal return in order to determine the Kansas tax. For example, if a decedent dies in 2005, and the gross estate exceeds the federal filing threshold, the executor must file with the United States the 2005 version of Form 706, applying current federal law. To determine the amount of the Kansas tax, however, the executor must file with Kansas the version of Form 706 that would have applied to a death in 2005 if Congress had made no changes in the IRC estate tax provisions after 1997. No such version of Form 706 exists. The version of Form 706 required for Kansas purposes is truly a "phantom."<sup>12</sup>

## Tax Cliffs

The 2003 Legislature added to the KET law a provision stating that, in the case of deaths occurring after 2006, the IRC as of Dec. 31, 2001 (rather than Dec. 31, 1997) is to be used to determine whether a Kansas return must be filed.<sup>13</sup> Therefore, beginning in 2007 a Kansas return will be required only if a federal return would be required under the IRC as of Dec. 31, 2001.<sup>14</sup>

This change had the effect of "decoupling" the Kansas filing threshold from the Kansas exclusion amount. In 2007, for example, both the Kansas and federal filing thresholds will be \$2,000,001,<sup>15</sup> but the Kansas exclusion amount remains "anchored" to 1997 law at \$1 million. The result is the creation of dramatic "tax cliffs" — circumstances in which a tiny additional amount in the estate can trigger a massive tax liability.

For example, assume that Alice, a widow, dies in 2007 with a gross estate and taxable estate of \$2 million. Because Alice would not be required to file a United States return under the IRC as of Dec. 31, 2001, no Kansas return is required, and no Kansas tax is due.

By contrast, assume that Betty, likewise a widow, dies in 2007 with a gross estate and taxable estate of \$2,000,100

— just \$100 more than Alice. Betty's gross estate exceeds the \$2 million exclusion amount for 2007, and Betty's executor is therefore required to file a federal estate tax return.<sup>16</sup> Betty's executor is also required to file a KET return. For Kansas purposes, however, the exclusion amount is determined by the IRC as of Dec. 31, 1997, which dictates an exclusion amount of only \$1 million for 2007. Therefore, the "phantom" federal return prepared for Kansas purposes, based on the IRC as of Dec. 31, 1997, will indicate a hypothetical state death tax credit of \$99,607,<sup>17</sup> and Betty's executor must pay \$99,607 to the state of Kansas.<sup>18</sup>

In other words, Betty's estate is only \$100 more than Alice's estate, but Betty's estate has a Kansas tax liability of \$99,607, while Alice's estate has none.

An even more dramatic "cliff" will apply to estates of decedents dying in 2009, when the United States filing threshold will rise to \$3,500,001.<sup>19</sup> If a Kansan dies in 2009 with a gross estate and taxable estate of \$3.5 million, no United States or Kansas return will

(continued on next page)

10. Under the 1997 I.R.C., the state death tax credit was limited to the amount by which the federal tax exceeded the unified credit. I.R.C. § 2011(e). The unified credit is determined by the applicable exclusion amount. I.R.C. § 2010(c).

11. The Kansas Department of Revenue instructions do explain that the 1997 form and instructions must be modified to reflect the increased applicable exclusion amounts. Kansas Department of Revenue, *supra* note 7, at 4.

12. Because I.R.C. § 2058 became effective in 2005, a three-step process is now required in determining the federal and KET liability: (1) The hypothetical federal estate tax liability under 1997 law is computed. (2) The KET liability is computed. (3) The actual federal liability under current law is computed; this includes the § 2058 deduction for Kansas and other state death taxes.

13. L. 2003, ch. 147, §§ 45 and 46.

14. K.S.A. 79-15,101 and 79-15,102.

15. A federal return is required if the gross estate exceeds the applicable exclusion amount under I.R.C. § 2010(c). I.R.C. § 6018(a)(1). Under § 2010(c) as it existed on Dec. 31, 2001, the § 2010(c) applicable exclusion amount for 2007 is \$2 million.

16. At first glance it would appear that Betty's estate has a federal estate tax liability of \$45, applying the 45 percent rate applicable

in 2007. I.R.C. § 2001(c)(2)(B). The KET liability, however, will produce a deduction that entirely offsets this liability. I.R.C. § 2058(a). Therefore Betty's estate has no federal estate tax liability.

17. Under I.R.C. § 2011(b)(1), the maximum state death tax credit on a taxable estate of \$2,000,100 is \$99,607. §§ 2011(b)(2) and (f) are ignored because they were added after 1997. Under 1997 law, the federal tax before credits is \$780,845, and the unified credit is only \$345,800. The difference is \$435,045, which far exceeds the maximum state death tax credit. Therefore the § 2011(e) limitation has no effect, and the final state death tax credit amount is \$99,607.

18. The exclusion amount is crucial to determination of the state death tax credit (and therefore the Kansas tax) because of I.R.C. § 2011(e), which limits the state death tax credit to the amount of the tax imposed by § 2001, less the § 2010 unified credit (which is determined by the exclusion amount). If the actual 2007 exclusion amount of \$2 million were applied, the federal tax before credits would be \$780,845, and the unified credit would be \$780,800, producing a difference of only \$45. Under § 2011(e), this would be the maximum state death tax credit, and therefore the Kansas tax would be limited to this amount.

19. I.R.C. §§ 6018(a)(1) and 2010(c).

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have to be filed, and there will be no United States or Kansas tax liability. If, however, the gross estate and taxable estate total \$3,500,100, both United States and Kansas returns must be filed. There will be no federal tax liability, but the Kansas tax liability will be \$229,210. In other words, \$100 in additional assets triggers a Kansas tax liability of \$229,210.

It is hard to conceive of circumstances creating a stronger incentive for tax evasion. Imagine that you represent the executor of the estate of a widow who dies in 2009. The executor (the decedent's son) marshals the assets and concludes that the total value of the gross estate is \$3,490,100. You are pleased to inform the executor that there will be no estate tax liability to either the United States or Kansas. A week later, however, the executor calls to tell you a final search among his mother's documents revealed one additional asset — a bank certificate of deposit (CD) worth \$10,000. This will raise the gross estate value to

\$3,500,100. You will have to inform the executor that, because of his commendable diligence, federal and KET returns must be filed. There will be no liability to the United States,<sup>20</sup> but the Kansas tax liability will be \$229,210. At best, you have a bewildered and very unhappy client on your hands. The executor may ask that you "overlook" the CD. You must of course decline, and the executor is put to a painful choice. He can do his duty, pay the tax, and diminish the family's resources by \$229,210, or he can switch to other counsel, who will not be informed of the CD.

### Less Pays More

The disconnect between the filing threshold and the exemption amount creates circumstances in which a smaller taxable estate may pay *more* tax than a larger taxable estate.

For example, assume that Bill, a widower, dies in 2007 with a gross estate of \$2 million. There are no deductions, and Bill's taxable estate is likewise \$2 million. Bill's estate is below the filing threshold and therefore has no federal or Kansas tax liability.

By contrast, assume that Tom, likewise a widower, dies in 2007 with a gross estate of \$2.1 million. Tom bequeaths \$600,000 of his estate to a charity, and the charitable deduction lowers the taxable estate to \$1.5 million. However, because Tom's gross estate exceeds the filing threshold, a return must be filed, and Tom's estate must pay KET of \$64,400.

In other words, Bill's taxable estate of \$2 million has no tax liability, while Tom's \$1.5 million taxable estate must pay \$64,400 in Kansas tax.

### Stealth Exemptions

K.S.A. 79-15,102 provides that a Kansas return must be filed if a federal return must be filed. In the final days of the 2003 session, the following sentence was added to K.S.A. 15,102:

"For estates of decedents dying on or after Jan. 1, 2007, the determination of whether the estate is required by federal law to file a return for federal estate taxes shall be made by referring to the provisions of the United States [I]nternal [R]evenue [C]ode of 1986, as such code exists on Dec. 31, 2001."<sup>21</sup>

As explained above, this sentence has the effect of raising the Kansas filing threshold from \$1,000,001 to \$2,000,001 in 2007 and 2008 and to \$3,500,001 in 2009. These are big numbers for Kansas. Surely they will dramatically reduce both the number of estates subject to tax and the amount of tax collected.

To most readers, the added sentence appears to be nothing more than an innocuous updating of the law. One must wonder how many legislators knew that it would have the effect of dramatically reducing estate tax revenues.<sup>22</sup>

### Stealth Repeal

As explained above, the sentence added to K.S.A. 79-15,102 in 2003 provides that, in the case of decedents dying in 2007 and later years, no Kansas return is required unless a U.S. return is required, under the IRC as of Dec. 31, 2001.

Section 2210(a) of the IRC, as of Dec. 31, 2001, provides that all federal estate tax provisions are repealed as to

the conference committee at the very end of the legislative session. Neither the conference committee report nor the explanations of votes in the House and Senate make any mention of the K.S.A. 79-15,101 and 79-15,102 changes. *Journal of Kan. Senate* 946-965; *Journal of Kan. House*, 845-864, 2003. Early in the 2003 session, two bills were introduced that would have conformed the KET to federal law as of Dec. 31, 2001, rather than Dec. 31, 1997; HB 2097 and SB 182. Each was referred to a committee, but no further action was taken on either bill. *Journal of Kan. Senate* 1046, 2003; *Journal of Kan. House* 943, 2003.

20. See the explanation in footnote 16.

21. L. 2003, ch. 147, § 46 [Now K.S.A. 2004 Supp. 79-15,102] An essentially identical sentence was added to K.S.A. 79-15,101 as well. L. 2003, ch. 147, § 45.

22. The 2003 estate tax changes were ultimately included in HB 2005, the omnibus tax legislation enacted as Chapter 147 of the 2003 Session Laws. Chapter 147, which was adopted in the final hours of the 2003 session, has 71 sections, spans 88 pages in the Session Laws, and affects 37 sections of K.S.A., relating primarily to the sales tax. The changes in K.S.A. 79-15,101 and 79-15,102 discussed in this article appear to have been added by

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decedents dying after 2009. In other words, no U.S. estate tax return is required if the decedent dies after 2009. Therefore, under the sentence added to K.S.A. 79-15,102 in 2003, no KET return will be required with respect to any decedent who dies after 2009. The sentence added in 2003 has the effect of permanently repealing the KET as to deaths after 2009.

Again, one must wonder how many legislators understood this. And one must question why the repeal of an important tax was effected with language so obscure. The KET currently raises approximately \$52 million each year.<sup>23</sup> Did legislators actually intend to forgo this important revenue source?

Some legislators may have been aware of the "sunset" provision included in the Economic Growth and Tax Relief Reconciliation Act of 2001 (2001 Act),<sup>24</sup> which (if not modified) will have the effect of restoring the federal estate tax (and, therefore, a federal filing requirement) in 2011. They may have assumed that the KET would be restored along with the federal tax.

That, however, is not the case. The "sunset" provision is embodied only in Section 901(a) of the 2001 Act and was not added to the IRC. The sentence added to K.S.A. 79-15,102 in 2003 refers only to the IRC itself, and IRC § 2210 permanently repeals the estate tax. K.S.A. 79-15,101 and 79-15,102 make no reference to provisions that were included in the 2001 Act but not incorporated in the IRC. As a result, the sentence added to K.S.A. 79-15,102 in 2003 will have the effect of permanently repealing the Kansas tax in 2010, regardless of any action taken by Congress in the future to reinstate the federal estate tax.

## Differential Elections

The 2001 act raised the federal exclusion amounts and thereby created a "gap" between the current federal exclusion amounts and the Kansas exclusion amounts, which are "anchored" to 1997 federal law. As a result planners have sought to apply different strategies to the federal tax and Kansas tax, respectively. A primary technique involves the use of differential elections to achieve "the best of both worlds."

The most common strategy is use of different marital deduction elections for federal and Kansas purposes, respectively. The first spouse to die bequeaths a portion of his or her assets to a trust that provides annual income for the surviving spouse, thereby, qualifying the trust for the marital deduction to the extent Qualified Terminable Interest Property (QTIP) treatment is elected by the executor.<sup>25</sup>

For example, assume that the first spouse dies in 2005. The executor makes a QTIP election for federal purposes in an amount sufficient to lower the taxable estate to \$1.5 million, an amount that is entirely sheltered by the federal unified credit. For Kansas purposes, however, the executor wishes to make a larger QTIP election, lowering the taxable estate for Kansas purposes to \$950,000, thus eliminating any Kansas tax.

The question then is whether the executor can make different QTIP elections for federal and Kansas purposes. The KDOR's answer is "yes." Differential elections are expressly allowed.<sup>26</sup> For deaths during 2005, the estate's saving in KET from differential elections can be as much as \$64,400.<sup>27</sup> The potential saving will be even greater in later years.

The KET statutes make no mention of differential elections. The KDOR's interpretation may well be an

*"It appears that the KDOR's allowance of differential elections for federal and Kansas purposes, respectively, may have been enlarged to permit filing of Kansas returns on the basis of hypothetical — rather than actual — property dispositions."*

23. Kansas Division of the Budget and Kansas Legislative Department, "Update to SGF memo for FY 2005 (Revised) and FY 2006 (Revised)," June 14, 2005, Table 1.

24. Pub. L. No. 107-16, 115 Stat. 38.

25. I.R.C. § 2056(b)(7).

26. Kansas Department of Revenue, *supra* note 7, at 4.

27. If the taxable estate is only \$950,000, the tax before credits is \$326,300. I.R.C. § 2001(c). The unified credit for 2005 deaths under 1997 law is likewise \$326,300. I.R.C. § 2010(c) as in effect prior to Pub. L. No.

107-16. Because the state death tax credit is limited to the difference between the tax before credits and the unified credit, no state death tax credit is allowed, and therefore no Kansas tax is imposed. I.R.C. § 2011(e); K.S.A. 79-15,102. By contrast, if the taxable estate is \$1.5 million, the tax before credits is \$555,800, which far exceeds the 2005 unified credit (under 1997 law) of \$326,300. The hypothetical state death tax credit computed under I.R.C. § 2011 is \$64,400, and this is the KET due. K.S.A. 79-15,102.

appropriate exercise of the Secretary of Revenue's discretion, but it remains only an interpretation, and one that could be reversed at any time by the KDOR. Many estate planners and their clients are relying on this interpretation and preparing wills and trusts accordingly. The availability of differential elections is a central issue that should be resolved by statute, not left to administrative discretion.

### Phantom Dispositions

It appears that the KDOR's allowance of differential elections for federal and Kansas purposes, respectively, may have been enlarged to permit filing of Kansas returns on the basis of hypothetical — rather than actual — property dispositions. The importance of this principle is illustrated by the following example.

Assume that a wife, the first spouse to die, has a gross estate of \$2.5 million. Her will includes a formula providing that the children are to receive the maximum amount that will reduce the federal and Kansas estate taxes to zero. The surviving husband is to receive the remainder of the estate. If the wife dies in 2005, this formula, as applied under current federal estate tax law, will dictate an allocation of \$1 million to the surviving spouse and \$1.5 million to the children. The \$1.5 million going to the children is fully sheltered from federal tax by the current \$1.5 million exclusion amount. Therefore the executor will distribute

the funds in this fashion and file the federal estate tax return accordingly.

For Kansas purposes, however, the 1997 IRC applies, and this provides for an exclusion amount of only \$950,000 in 2005. For Kansas purposes, therefore, the executor would prefer to treat the allocation to the children as being only \$950,000, with the remaining \$1,550,000 going to the surviving husband. Lowering the children's share to \$950,000 would eliminate any Kansas tax.

The question then becomes whether the executor can report for Kansas purposes a "phantom" disposition — an allocation of property different from what actually occurred. In this case, the executor would prefer to report, for Kansas purposes, that application of the formula bequest under 1997 federal law produces an allocation of \$950,000 to the children and \$1,550,000 to the husband. The executor would prefer to file a "phantom" return based on this allocation, presumably with an explanation that the actual disposition was otherwise. The result would be savings in KET of \$64,400.

This approach was first proposed by Timothy O'Sullivan and Stewart Weaver in the *Journal of the Kansas Bar Association* articles published in 2002 and 2003.<sup>28</sup> In the 2003 article O'Sullivan and Weaver report they "have confirmed with a KDOR official that the KDOR will interpret marital deduction formula clauses under prior federal law, *irrespective of the amount of assets actually funding the bypass share*."<sup>29</sup> (Emphasis added.) It appears that at least some returns have been filed and accepted on this basis. However, as of the writing of this article, to the best of this author's knowledge there has been no formal announcement of the KDOR's position on this matter.<sup>30</sup>

As with differential elections, acceptance of returns reporting "phantom" dispositions does not appear to be a foregone conclusion based on the language of the statute. This position may

well be an appropriate exercise of the Secretary of Revenue's discretion, but it is an administrative policy that could be changed at any time. Many estate planners and clients are preparing wills and trusts in reliance on this policy. It is an important issue that should be addressed in the statute itself.

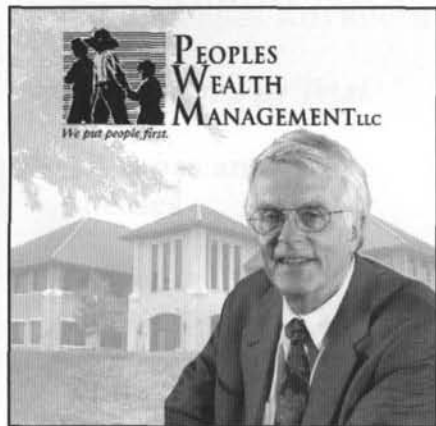
### Dad vs. the Kids

The distorted linkage between federal and Kansas law, combined with the KDOR's acceptance of returns based on dispositions that did not in fact occur, could well prove a fertile source of litigation.

For example, assume the circumstances described under "Phantom Dispositions" above. The will includes a typical formula clause calling for a division of assets that reduces both federal and state taxes to zero. As described above, the executor actually allocates only \$1 million to the surviving husband and reports this as the marital deduction on the federal return. On the Kansas return, however, the executor reports an allocation of \$1,550,000 to the husband, lowering the Kansas taxable estate to zero and the Kansas tax to zero.

If the executor reports to Kansas an allocation of \$1,550,000 to the surviving husband, does this create an entitlement of the surviving husband to actually receive that amount? Do the children have an offsetting right to limit the surviving husband's allocation to \$1 million because that is the amount reported on the federal return? If the children and the surviving husband are all of one mind, there may be no problem. But if there is conflict or disagreement, how can the executor satisfy both dad and the children?

This potential for litigation suggests that the current distorted linkage between federal and Kansas law is a trap for the unwary — both taxpayers and their counsel.



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28. Timothy O'Sullivan and Stewart Weaver, 2002 *Kansas Death Tax Legislation: An Emperor in Need of Clothes*, 71 J. Kan. Bar Assn. 10, 23 (2002); Timothy O'Sullivan and Stewart Weaver, *Planning for Kansas Death Taxes in 2003: A 'Notice-Able' Difference*, 72 J. Kan. Bar Assn. 10, 32-33 (2003).

29. Timothy O'Sullivan and Stewart

Weaver, *Planning for Kansas Death Taxes in 2003: A 'Notice-Able' Difference*, 72 J. Kan. Bar Assn. 10, 33 (2003).

30. In their 2003 article O'Sullivan and Weaver state that "It is anticipated that future notices or pronouncements of the KDOR will formally confirm this position." *Id.*

## Conclusion

The current KET law has significant defects, and the problems it creates will become more serious beginning in 2007. For that reason it is important that the Legislature address this problem in 2006. Perhaps the Legislature will decide to repeal the estate tax and forgo the \$52 million of annual revenue it produces. If, however, the Legislature decides to retain an estate tax, it is important that the tax be fixed.

The KET problems all arise from the continued linkage with federal law. The solution, therefore, is obvious: Kansas needs to terminate the relationship with federal law and go its own way. There should be a new, free-standing

KET, devoid of reliance on or links to federal exemptions and credits. Adoption of such a free-standing tax<sup>31</sup> would permit the Legislature to make its own decisions as to how much revenue an estate tax should raise, what the filing threshold should be, what rate structure should be imposed, and how the tax should be interpreted and administered. ■

### About the Author

**Martin Dickinson** is the Robert Schroeder Professor of Law at the University of Kansas. He is the author or co-author of many publications, including "Taxation of Estates, Gifts and Trusts," now in its 22nd edition, and has received the ABA's Harrison

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*Dickinson received his bachelor's degree from the University of Kansas and his law degree from the University of Michigan. He served as dean of the University of Kansas School of Law from 1971 to 1980.*

31. Legislation of this kind was introduced as SB 148 in the 2003 session of the Kansas Legislature. SB 148 was considered by the Committee on Assessment and Taxation but was not referred to the full

Senate. SB 148 was drafted by an informal working group chaired by Nancy Schmidt Roush, Overland Park. The author of this article was a member of that group.

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